Navigating the Road to

Planning, Execution, and Things that Go Bump in the Night

By George Speckart

Understand the value of proper psychological measurement tools.

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a Jury Verdict

Intellectual property lawsuits are presently of keen interest in the litigation world. Much of the current litigation has been spawned by small commercial interests that buy up patents and assert them against large, established corporations. I have just recently reviewed a stack of documents for a case in which three patents were bought by a small, unknown company for $10. One of them is being asserted for damages of over $5 million, and the company has already obtained settlements for about $2 million from about 10 other erstwhile defendants. Clearly, the economic allure for plaintiffs is irresistible, and the universe of potential lawsuits is practically unfathomable.

It wasn't always like this. Not so long ago, most patent disputes fell into two classes: 1) the "Goliath versus Goliath" type, in which two large corporations went head-to-head over their products and patents (*e.g.*, the Procter & Gamble versus Kimberly-Clark "diaper wars"; Caterpillar v. Deere; Dow v. Exxon Chemical; etc.); or 2) the old-fashioned individual investor who worked hard for his patent and was himself taking on the large corporation. This new third breed of litigation involves the numerous small patent holding companies that buy up the intellectual property and then earn their revenues entirely through settlements and trial verdicts against the alleged infringers.

Regardless of which type of IP case is under consideration, however, IP litigation is a peculiar animal that has many idiosyncratic characteristics compared to other types of lawsuits. From the legal standpoint, its peculiarities and idiosyncrasies are numerous and well-known to the IP litigator. The purpose of this paper is to describe the unusual characteristics of IP cases from the standpoint of jury psychology, and the type of findings, results and observations that are revealed in pre-trial jury research involving these types of cases.

The Perceptual "Starting Point"

In most lawsuits, jurors start with a cognitive map that has as its starting point the answer to the question: "Who are these people?" Who is the plaintiff, and who is the defendant? What are they like? What are their traits, images, reputations, and other characteristics? In the "Goliath vs. Goliath" cases, these answers are supplied by jurors according to the respective corporate images of the litigants. If one of the parties is a "home town employer" (*e.g.*, Microsoft in Seattle, or Coca-Cola in Atlanta), there will be definite, well-formed images in jurors' minds. More often, however, the images of the parties are fairly even and somewhat indefinite. For example, in the Procter & Gamble v. Kimberly-Clark diaper wars, both companies had good corporate images, and the starting point of "Who are these guys?" left both sides at an even point—a "wash," or a draw. In this case, the corporate images did not play a role in the cognitive map that jurors used to problem-solve the case, and the verdict results became more a result of the substantive infringement and validity arguments generated by counsel. However, other research that we have conducted involving companies undergoing a public relations or image problem indicated that jurors' opinions do indeed "tilt" against the litigant experiencing the problem.

Thus, in the "Goliath vs. Goliath" scenario, in which one corporation sues another, the corporate images may or may not play a role in the outcome, depending on whether the corporate litigants have specific reputations or images in the venue of the trial. However, in IP litigation where there is a maverick, lone, individual inventor, there is strong underdog sentiment favoring the plaintiff; and particularly when this inventor makes a charismatic witness, the defendant faces a formidable uphill battle to overcome the initial favoritism generated by the question "Who are these people?"

In the third case—the "new" IP cases with the small patent holding company (the so-called "patent trolls") versus the established corporation—our research over the past few years suggests that jurors simply do not care much about who the plaintiff is. It is a small company, to be sure, but they recognize that it is not a "mom and pop" corner grocery; rather, it is seen as some type of investment interest, and it typically generates little concern, subjective interest, or image of any type that influences juror dispositions in the case. On the other hand, while the defendant is often well known (*e.g.*, Sony, Dell, Nintendo, or Toyota), our experience is that most such corporations do not arouse much in the way of sentiment either. Instead, jurors dive into the case itself, and try to make sense of what is, for them, a bewildering morass of technical issues, patent issues, conduct and economic issues (*e.g.*, licensing applications or negotiations; marketing and sales data; and various other related types of information).

Consequently, our basic premise to begin the discussion of juror perception of IP cases is that, unless there is an individual inventor as a plaintiff, verdicts are typically not as much biased by the image of the litigants as they are in other types of cases, such as product liability, fraud, toxic torts, and other types of litigation.

How Are Invalidity and Infringement Arguments Perceived and Decided?

The most common adage heard among IP litigation teams—and it is common because it happens to be true—is that invalidity and infringement questions are not generally decided on substantive technical issues so much as they are decided on conduct issues. In this context, the term "conduct" is a very broad concept that consists of factors such as the initial notice of infringement and various aspects of communication between the parties; the prosecution history of the file; characteristics and behavior of the inventor; licensing negotiations and agreements; royalties paid to others; and the marketing and sales information associated with the related or accused products. Jurors consistently gravitate toward, and retain information pertaining to, these topics and resist processing

and retaining information connected to the patent itself and the accused device(s) that is more technical in nature. Indeed, many litigators express the view that IP litigation outcomes are *entirely* determined by such "conduct" issues. This view is indeed difficult to refute.

In the bewildering morass of arcane technical issues that surround the lay juror in an IP trial, jurors look for something to "hold on to" as a basis for their verdicts because they cannot adequately comprehend the nuances of the technical issues that are, in principle at least, critical to infringement and validity decisions. Many IP litigators with whom I have worked over the years start with the premise that jurors will never adequately understand the technical issues involved, and accept from the beginning that it is imperative to secure these various "other" determinants of the verdict. Moreover, with regard to juror comprehension, the ultimate in cynicism was expressed by one particularly successful IP litigator who told me, "The most important thing is to *act like you believe* your side of the case more than the other lawyer." I don't believe that this view can be decisively discredited either.

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Capture the Room

Obviously, however, one should not approach the IP case with the supposition that "jurors will never understand it anyway." Here, the consideration of graphics, demonstrative exhibits, boards, 2- and 3-D animations, and electronic presentation systems as a means to educate the jury plays a central role. The absolutely pivotal task of dominating the visual side of the trial is a topic that has been dealt with in many fine publications elsewhere, and the breadth of this topic is beyond the scope of the present treatise. It is important to note, however, that the production of effective demonstrative exhibits is not something that should be relegated to brainstorming sessions by the trial team; rather, the effectiveness of graphics and exhibits should be tested with a mock jury panel, using the results as an empirical basis for augmenting and refining the graphics according to what *they* (mock jurors) say that *they* need to see in order to assimilate case issues in a manner that gives the maximal tactical advantage to your client.

You win by out-preparing the other side. The way to gain an edge in the crucial fight for the minds of the jury is to captivate the jury visually, with exhibits that are developed through an *iterative* process. In other words, graphics are created, then tested, then re-created until the trial team has what it needs to convince the jury. In today's "trial by hurry" atmosphere, it is still not uncommon to see trial lawyers sketching concepts with felt pens on flip charts, justifying this practice with "I can communicate better with the jury this way." Alternatively, impossibly complex charts by experts are used as the expert created them, with meager consideration for whether the jury can comprehend and retain the crucial information.

It is important to remember that *if the jury does not retain the information and bring it back to the deliberation room in their memories, then the communication is just as effective as if it had never been presented at all.*

With the typical damage awards that are at stake these days in IP cases—often tens or hundreds of millions of dollars—the time simply must be set aside to get the graphics right.

Plan for Misinformation during Deliberations

One peculiar aspect of IP cases is that, since jurors are struggling tenuously to understand the issues, the emergence of a "self-appointed expert" on the jury panel can change the entire complexion of the deliberative process. With jurors wandering aimlessly through the issues trying to make sense of what they have heard, the emergence of the "expert" in the jury room allows jurors to let someone else handle issues that they cannot understand. The emergence of the "expert" in the jury room is, therefore, often met with relief by those troubled jurors who feel inadequate to the task at hand. When this occurs, misperceptions and "myths" about patent law; patent application; standards; the approval process; and validity issues generally, can and do become "truth" if propounded by the "expert" on the jury.

In particular, observation of deliberation processes in mock trials reveals a number of spontaneous perceptions and specious arguments pertaining to validity and infringement issues that are often naively accepted by other jurors. A careful consideration of many of these perceptions and arguments that occur at the jury level shows that their appeal often derives from the fact that they reduce the "cognitive load" on the jury. In other words, adoption of such specious perceptions and arguments allows jurors to escape having to grapple with the core objective technical nuances involved in validity and infringement arguments. As we consider these below, however, it is noteworthy that some of these perceptual tendencies among jurors are not, strictly speaking, faulty or erroneous per se—they may be more appropriately considered as psychological tendencies, or non-factual decision-making processes, that jurors use in determining the believability of the central claims of an IP case. Some are "quasi-factual"—*i.e.*, partially true, or true in some circumstances but not in others. In any event, these types of themes and arguments generated by lay jurors are listed below for consideration by the litigator who must plan for the likely jury dynamics that will affect the outcome of the case:

Resistance to Invalidity

There is invariably—invariably—a substantial subset of any group of jurors that simply believes that, if a patent is granted, it must be valid—period. (Our experience suggests that this is true for 20–30 percent of any group of jurors.) The idea is that, if the United States Patent and Trademark Office gave its approval, then either it is more qualified than the jury to make this decision, or the jury simply should not be second-guessing it for a variety of other reasons. In some cases, jurors tend to believe that a patent is something like an application to the government to obtain a right, like a building

permit, such that what is primarily most important is simply who gets there first. In this manner of thinking, it does not particularly matter what is previously known by others, or what has been published, or even reduced to practice. What matters is who gets to the Patent Office first, and who gets the patent. Thus, we see jurors claim that a patent is valid, regardless of what anyone else claims, says or does because the applicant applied for the patent and the Patent Office awarded it. This juror perception tendency can be especially important if the patent has been subjected to a re-examination proceeding, since jurors may then point out that "it has been looked at more than once and the examiner still said it was OK."

"All Inventions Are Combinations of Other Things"

Jurors will occasionally argue that all inventions are necessarily combinations or compilations of ideas that preceded it and, therefore, that the existence of prior art is more or less immaterial. As a result, arguments of obviousness and anticipation can often become impotent at the jury level and prior art simply does not enter into the calculus of establishing the validity of a patent.

If It Is Not Patented, Then It Is Not Prior Art

We have run mock trial projects in which jurors were specifically instructed that, in order for a source to be considered as prior art, it need not have been patented. Some jurors, in their subsequent deliberations, nonetheless adamantly argued that there was no significant prior art because an author or inventor never obtained a patent. Thus, the existence of a patent is sometimes used by the jury as an indicator as to whether prior art truly exists, or alternatively, whether an idea or invention is substantial or significant, even when they are instructed to the contrary.

"Sweat Equity"

In cases where a defendant is arguing for invalidity based on obviousness, one fact pattern that can mitigate against the perception of obviousness is the amount of trouble and toil that the inventor experienced during the invention process. When an inventor can credibly testify as to sleepless nights of trial and error in attempting to make a device function properly, a jury is far less likely to find that an invention is obvious. As one potential feature of the testimony of the charismatic maverick plaintiff inventor, this type of testimony is one juncture of the trial that is particularly risky for corporate defendants.

Market Performance

Perceptions of whether a patent should be considered as obvious, or whether prior art should be considered as substantial or significant, are often strongly influenced by the real world market or economic impact of the related products or devices. In numerous cases, it has been observed that an idea or invention should not be considered as prior art "because he [the inventor] did not do anything with it" (*i.e.*, put it on the market and make a profit). Similarly, an invention described by a patent-in-suit is often concluded *not* to be obvious if its introduction to the marketplace has generated strong profits or an increase in sales relative to products based on prior art. Perhaps most importantly, the perception of validity is often intertwined with economic issues connected with the history of licensing negotiations: If a patent has never been licensed to anyone, it is far less likely to be found as valid compared to one for which a license has been purchased by many other entities, particularly if those other entities are paying substantial sums. So, instead of using "what the Patent Office thought" as a means to infer whether an idea or invention deserves a valid patent, jurors may use the behavior of others—the market, or other licensees—to make such inferences.

Protection of the Patent

Jurors are aware that, like trade secrets, one can infer the value of something by how assiduously the owner acts to protect it. Thus, if a patent owner gives vague or late notice of infringement, jurors are less apt to find that the invention is truly valuable, or even useful. We have seen otherwise strong plaintiff cases, on patents that would otherwise be exceptionally profitable, fail completely as a result of late notice of infringement. Jurors expect holders of valuable patents to strike immediately and fight hard if there is an alleged infringer, and in the absence of such behavior by the patent holder, defendants can often secure a verdict in their favor.

Interdependence of Validity and Infringement

Many jurors are unable to see infringement and validity as separate issues, and start off their consideration of infringement interrogatories in a verdict form with the question "How can it be infringed if it's not valid?" In practice, they often exhibit difficulty in extricating infringement and validity issues on a variety of levels. Thus, for example, if a patent has not been associated with market success (*i.e.*, it has never been licensed or has not been embodied into a commercially successful product), or if the patent owner gives notice of infringement that is vague or delayed by a number of years, jurors are apt to doubt the patent's "importance." This conclusion in turn mitigates against the perception of validity, and ultimately, against the perception of infringement as well, since, if the patent is not "important," there is no need for the defendant to resort to infringement in order to achieve its objectives. (These considerations are more apt to be relevant in the first two types of patent cases mentioned at the outset compared to the more contemporary "patent troll" litigation.) Conversely, the more arduously a patent owner fights to protect a patent, and the more licenses have been issued, the more likely it is that a patent will be perceived to be valid and even attractive to a putative infringer. In such cases, there is greater motive attributed to the alleged infringer and, therefore, an increased likelihood that the defendant will indeed be seen as infringing.

Noticeable Differences

Particularly in present-day IP cases involving computer and entertainment media (*e.g.*, digital video recorders; DVD players; digital cameras; computers and the Internet), jurors become overwhelmed with the technology and look for other criteria upon which to make decisions. One such "other" criterion that has been observed repeatedly is the propensity for jurors to determine infringement based on whether the consumer, or untrained eye, would *notice a difference* between what the patent and the accused device do or create in the final product. Thus, for example, in the area of video and digital imaging technology, we have seen jury decisions of infringement when there are substantial differences

between the patent and the accused device simply because the consumer is judged to not be able to discern visibly any noticeable difference between the video image generated by each one.

Requirement of a Patent to Show No Infringement

Jurors also sometimes require the granting of a patent in order for a defendant to show it was not infringing; that is, if what a defendant is doing is truly different, then that defendant ought to have its own patent covering what it is doing. Comments such as the following are not uncommon in deliberations: "If [Defendant Company] is now doing something different, where is *its* patent on what *it* is doing that is supposedly different?" In other words, many jurors think that everything is covered by a patent somewhere. What patent covers the defendant's technology? If the defendant can't show the jury what patent it *is* using, then some jurors will conclude that it must be using the patent-in-suit.

Jurors have a strong predisposition to favor what has actually been put into play in the marketplace over an expert's theoretical assessment.

Differences Are Just "Tweaks"

One of the greatest obstacles to typical infringement defenses is a perception among jurors that the differences between the patent and the accused devices are just "tweaks," *i.e.*, insubstantial. A lack of comprehension of the subject matter can cause differences between a patent and an accused to device to seem small, insubstantial, or insignificant. As comprehension of the technical issues advances, "smaller" differences become more important and substantial. However, as an empirical finding, research involving various kinds of technology reveals that jurors are apt to dismiss technical differences as "tweaks" that have little importance and, accordingly, find infringement by the defendant. To some extent, this perception may also be grounded on a cynical view that an alleged infringer will take an invention and "design around it" as a sinister attempt to steal technology rather than pay a licensing agreement.

The Face of the Patent

On occasion, during deliberations, jurors will make inferences about a patent based on observations of the face of the patent document or the first few pages. At times, they may come to superficial decisions about the scope of a patent based simply on the title of the patent, the abstract, and/or the drawing of the preferred embodiment. While the true scope of the patent may be much broader, jurors may artificially narrow the scope of the patent based on what is specified in the title of the patent or the drawings that are present in that document. These tendencies can, in some circumstances, allow a defendant to escape a finding of infringement when the accused device is significantly different than the preferred embodiment, its associated diagrams, or the wording in the abstract or title of the patent.

Lack of Appreciation for Duty of Disclosure

When jurors are given the opportunity to decide a charge of inequitable conduct, it is common to find a lack of awareness or appreciation for an inventor's duties to be thorough, complete or exhaustive in revealing or listing relevant prior art to the patent examiner. We have seen plaintiff jurors rebut defense arguments for inequitable conduct with comments such as, "those things are all accessible to the patent examiner." In other words, in the plaintiff jurors' minds, it is the *patent examiner's duty* to find and compile prior art, not the applicant's. In general, there exists a great deal of confusion among jurors regarding who has the duty to reveal prior art in the patent application process.

Confused Duties and Responsibilities

Jurors do not have any idea who has the duty or responsibility to discover infringement. This area of confusion becomes especially relevant when the issues of notice and laches are central to a case. Some jurors believe that it is the patent holder's duty to discover an allegedly infringing device in the marketplace, while others think that the manufacturer of the accused device has the duty to research the universe of existing patents as a prerequisite to putting the device in the stream of commerce. When the timing of a notice of infringement can make the difference of millions of dollars in the computation of damages, the assignment of these duties and responsibilities becomes crucial.

Outcome of a Hypothetical Licensing Negotiation

In the battle for the determination of a reasonable royalty, there is often a conflict between a theoretical royalty rate, based on an expert's assessment of the custom and practice in an industry, versus royalty rates that are actually being paid in the marketplace for similar patents that generate similar products. Jurors have a strong predisposition to favor what has actually been put into play in the marketplace over an expert's theoretical assessment. In short, they tend to eschew abstract considerations of royalty rates in favor of a concrete established track record for comparable devices.

Conclusions

One of the organizing principles that runs through the preceding list of juror perception tendencies is a propensity among jurors to favor the concrete over the abstract, where "concrete" is generally linked to the conduct, behavior or assessment by others with regard to the patented idea. Thus, for example, if utilization or embodiment of the patent has resulted in enormous commercial success, or if licensing agreements with other corporations are numerous, it becomes more difficult to escape charges of infringement.

Jurors also look to the Patent Office for direction: For example, jurors often check for the simple existence versus non-existence of a patent as an "anchor" to "ground" their decisions. If an idea alleged to be prior art was patented, then it is more likely to be considered truly to be "prior art" compared to an idea that was never patented. If what the defendant is doing is covered by a different patent, then a conclusion of infringe-

ment is less likely, compared to a situation in which the defendant cannot point to a different patent that covers its accused device. So, in addition to market forces, jurors look to see "where the patents are" and "where they aren't" as a method to guide their decisions on infringement and validity.

Jurors' reliance on what the Patent Office has done for guidance has tactical importance for one of the most irksome problems experienced by defendants in IP cases—namely, the tendency for jurors to find differences between the patent and the accused device as insubstantial, or just "tweaks." Accordingly, one method to make a "tweak" appear to be "large" is to compare it to the differences previously noted as significant by the patent examiner.

Possibly, a review of the file history of the patent in suit or other similar patents could supply jurors with a ruling by the patent examiner that a modification is indeed meaningful or substantial (for example, when a patent is resubmitted with a narrower scope, leading to the ultimate granting of a patent after a previous rejection); then, if this modification could be shown to be comparable or similar to the difference between the patent and the accused device, jurors would be more likely to find no infringement. Another way of saying this is to demonstrate to jurors that the degree of difference between the patent and the accused device is at least as large as the difference that has caused a patent to be approved over prior art.

In short, jurors need a conceptual "scale" to gauge the magnitude of a "tweak." In their naïve state (which is what one should assume at trial), jurors do not understand the technology and, therefore, see everything as essentially similar. On the other hand, the more they learn, the more they will start to see things as different from each other. However, jurors have a tendency to fall back on the patent examiner's expertise when their own comprehension fails them. Using this dynamic, one should be able to establish that a certain degree of difference is "good enough" for a patent examiner to grant a patent in a re-examination proceeding; therefore, a similar degree of difference is "good enough" to say that the accused device is different from the patent in suit. Alternatively, one can use arguments derived from what the prosecuting attorney claimed to be significant in the application or re-examination process, and contrast that to what is being claimed later, in litigation, as a means to establish the perceived significance of a "tweak."

Ultimately, the combination of events, issues, themes, arguments, and the substantive nature of the device(s) at issue is unique to each case. With the amount typically at stake in modern IP litigation, it is imperative to use jury research to ground the trial team in reality and to meet the jury where they are. Thinking of an IP case and judging its perceived merits at the jury level on an *a priori* basis is extremely hazardous for a trial team that has been immersed in the facts of the case for months at a time. Even if some of the conditions described herein are met (for example, one can point to a patent other than the patent in suit that covers the alleged infringing device), that does not necessarily mean that a jury will find in the expected manner (in this example, for the defense on infringement). There are too many moving parts in any IP case to presume which ones will "resonate" at the jury level in the absence of any empirical testing.

Vulnerabilities that arise as a result of "flying blind" into trial are nowhere more apparent than in the area of jury selection. Our experience in going to trial in various IP cases is that credible and reliable profiles of favorable and unfavorable juror typologies are typically absent from the battle plan. This is particularly worrisome in view of the previously discussed phenomenon of the emergence of the "expert" in the jury room who single-handedly changes the entire dynamic of the deliberations. In short, leaving the wrong person on the jury panel can nullify thousands of hours or work and potential damage awards of hundreds of millions of dollars.

The "expert" on the jury panel will not necessarily be obvious to the untrained eye during jury selection. However, the chances of obtaining a favorable jury are greatly enhanced when the proper psychological measurement tools are incorporated into a scientifically designed supplemental juror questionnaire. *Voir dire* in federal court is often insufficient to collect meaningful information on jurors and, consequently, the same adage applies to jury selection as it does to graphics: You win by out-preparing the other side. The development of valid juror profile data through pre-trial research is, therefore, another means to maximize the likelihood of a favorable outcome for your client. FD

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